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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

FILE: LIN 02 283 52517

OFFICE: NEBRASKA SERVICE CENTER

DATE: **JAN 09 2004**

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

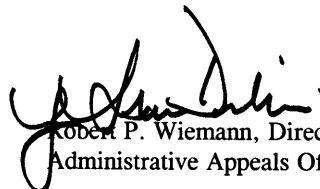
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a natural stone fabrication company that currently employs nine persons and has a gross annual income of \$1,500,000. It seeks to employ the beneficiary as an architect and designer for a period of three years.¹ The director denied the petition for failing to establish that the proffered position was a specialty occupation.

On appeal, counsel submits a brief and additional evidence.

On the Form I-129, the petitioner listed the proffered position as "Architect & Designer." Accompanying the Form I-129 were: a cover letter from counsel which enclosed: a letter of support from the petitioner's "principal"; a copy of the petitioner's "Company Brochure/Business Plan"; and documents pertaining to the beneficiary's educational credentials, work experience, and status as a registered architect in Brazil.

The principal's letter included this information:

The position of an Architect and Project Designer is a specialized one. The Architect/Project Designer will meet with [the petitioner's] customers to plan and analyze the customer's needs. This individual must possess the ability to design projects, define problems, collect data, establish work goals, cost projects, and work with [the petitioner's] list of growing clientele to choose the appropriate stone product for the project, and to coordinate colors to achieve and maintain optimum aesthetic appeal. The person filling this position must also be able to interpret an extensive variety of technical instructions in mathematical and/or diagram form and deal with several abstract and concrete variables. It is preferred that the person occupying this position be fluent in [the] Portuguese and/or Italian languages.

The Architect and Project designer will confer with clients, as well as project fabricators, to obtain information on limitations and functional capabilities of project designs. The individual will work towards

¹ The petitioner and counsel vary the way in which they generally describe the proffered position, from "Architect & Designer" (Form I-129), to "Architect and Project Designer" (letter supporting the Form I-129), to "essentially . . . an interior project designer" (counsel's letter in response to the director's request for additional evidence).

enhancing efficient project operation so as to meet required deadlines, as well as maximizing the effective use of personnel resources to achieve desired objectives.

This individual must be able to read, and interpret general business an[d] industry periodicals, professional journals, technical procedures, building codes, and/or government regulations. He or she is also required to generate reports, business correspondence, project bids, and procedure manuals. Finally, this individual must have the ability to effectively present information and respond to questions from groups of developers, contractors, employees, homeowners, and the general public.

[The petitioner] requires the individual hired in this position to perform each facet of the responsibilities satisfactorily. The individual is required to have[,] at a minimum a bachelor's degree with emphasis in Architecture, as well as significant exposure to building projects involving the utilization of granite, marble, onyx, and other natural stones.

According to the Executive Summary of its business plan, the petitioner is "a natural stone fabrication company specializing in selling custom cuts, countertops, vanities, and other to[-] order custom fabrication" in "granite, marble, slate, onyx, and other natural stone." The Executive Summary also indicates, in part, that the petitioner "sells to local residential and commercial builders and contractors as well as directly to homeowners." The petitioner states that approximately 80 percent of its present sales are to builders and contractors and about 20 percent to homeowners. Among other facts, the Executive Summary also notes that it "has offered wholesale sales of granite and marble slabs to fabricators in the greater Twin Cities metropolitan area" since December 2001.

The director issued a request for additional evidence. It stated, in part, that the documentation so far submitted was insufficient for favorable consideration of the petition, and it requested additional evidence that would satisfy at least one of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A) for qualifying the proffered position as a specialty occupation. The director also requested that the petitioner provide evidence of the beneficiary's license to practice architecture in the state where she would be working, if her duties were to include architectural work.

In response, counsel provided a letter which, in part, asserted that the proposed duties "are of a specialized and complex nature

and would require knowledge associated with at least a baccalaureate degree to perform them."

The letter explained that the beneficiary's duties would involve "reading, understanding, and interpreting complex building plans" from building developers, and consultation with and suggestions to the developers' architects. Also according to the letter, the beneficiary would meet with individual homeowners to assist them with the selection of stones and with a determination about "the degree of functionality" they would want to maintain in the home after incorporating the petitioner's stones. The letter also notes that, "more importantly," the beneficiary would appraise labor and material costs, to permit the petitioner to enter appropriate bids on proposed projects.

Counsel's letter further asserted that the beneficiary would utilize her proficiency in Portuguese and Italian as the petitioner's liaison with its suppliers, who are in Brazil and Portugal.

The letter also stated that the proffered position would not involve the drawing of building plans or any other kind of architectural work, and that, accordingly, an architect's license was not required. However, counsel indicates a bachelor's degree in architecture provides "the specific academic discipline that prepares individuals to have a solid ability to appreciate building plans." Counsel states, "While [the beneficiary] would not be functioning as an Architect when her employment with the Petitioner commences, yet, her training in the academic discipline which verily involves mathematical and schematic representations, and her familiarity with the building construction industry are mandatory for the satisfactory performance of the duties described herein."

Counsel also stated that the beneficiary "will function essentially as an interior project designer for [the petitioner]," and he provided a copy of relevant state statutes to show that the beneficiary does not have to have a license to serve as such.

The director denied the petition because he determined that the petition had not established the position as a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(A). The decision stated, in part:

The evidence presented has not established that this position qualifies as a specialty occupation. Rather the duties are more in line with a stone craftsman, business translator, interior designer, or a combination of all three. The Service is unable to determine which type of job responsibility would be the beneficiary's primary focus and it appears that none of

the responsibilities require the services of a licensed architect.

On appeal, counsel asserts that the proffered position qualifies as a specialty occupation "due to the complexity of the job responsibilities." According to counsel, the proffered position requires "a solid understanding of complex commercial building plans such as multi-housing as well as public structures," and "the ability to design projects, define and have ideas about solving design problems, collect data, establish work goals, and cost projects so as to determine the material and man-hours required to complete a project." Counsel repeats earlier assertions about the position's requiring the abilities to interpret technical data and instructions, to deal with several abstract and concrete variables, and to meet with clients to help them plan and analyze their needs. Counsel also again highlights bid formulation as the most important duty, and adds that the beneficiary "will be charged with the overall responsibility of working towards enhancing efficient project operation so as to meet required deadlines as well as maximize the effective use of personnel resources to achieve desired objectives." Counsel further commented on the Italian/Portuguese liaison duties by asserting that they made "professional knowledge or background indispensable" because they would involve "trouble-shooting and negotiating complex and international supply contracts."

Counsel also asserts that the director misunderstood the proffered duties.

To support the appeal, counsel enclosed a letter from Chris Aimua, a registered architect and president of Chris Aimua & Associates, Inc., Architects & Building Contractors, who has provided *pro bono* assistance to the petitioner since its inception in January 2000. The author states, in part:

I advised [the petitioner] to hire an employee with an architectural background. Most of the projects that [the petitioner] submits for bids are for commercial projects, with very detailed and complex building plans. I felt then, and still feel that only a person with an architectural training would be able to firmly grasp the details of the drawings, and therefore, properly estimate the cost of each project. While the person who would assist [the petitioner] in this capacity would not be engaged in a role traditionally reserved for architects, a person with an architectural degree would be the most viable candidate.

Section 214(i)(1) of the Immigration and Nationality Act 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As the following discussion will show, the evidence does not satisfy any of the H-1B specialty occupation criteria of 8 C.F.R. § 241.2(h)(4)(iii)(A).

I. Baccalaureate or higher degree or its equivalent as the normal minimum requirement for entry into the particular position.

-8 C.F.R. § 214.2 (h) (4) (iii) (A) (1) .

The AAO routinely consults the Department of Labor's (DOL) *Occupational Outlook Handbook* for authoritative information about particular occupations' duties and educational requirements. Here the AAO consulted the 2002-2003 edition.

The director was correct in his assessment that the occupations he saw as related to the proffered position do not require a bachelor's degree or higher in a specific specialty. See the Handbook's treatment of designers and interior designers, at pages 120-123; and stonemasons, at 435-436; and translators, at 596.

However, the director overlooked the cost estimator occupation, which is especially relevant, as it relates to the petitioner's emphasis on the primacy of the cost analysis and bid preparation aspects of the position. This is obvious from the Handbook's initial paragraphs on the "Cost Estimators" occupation, which the Handbook addresses at pages 40-42: :

Accurately forecasting the cost of future projects is vital to the survival of any business. Cost estimators develop the cost information that business owners or managers need to make a bid for a contract or to determine if a proposed new product will be profitable. They also determine which endeavors are making a profit.

Regardless of the industry in which they work, estimators compile and analyze data on all the factors that can influence costs—such as materials, labor, location, and special machinery requirements, including computer hardware and software. Job duties vary widely depending on the type and size of the project.

The Handbook, at page 41, indicates that, while employers of cost estimators in construction increasingly prefer to hire persons with degrees (that is, associate or bachelors degrees) in architecture or other construction-related fields, there is not yet a requirement for a bachelor's degree or higher in one of those fields:

Entry requirements for cost estimators vary by industry. In the construction industry, employers increasingly prefer individuals with a degree in building construction, construction management, construction science, engineering, or architecture. However, most construction estimators also have considerable construction experience, gained through work in the industry, internships, or cooperative education programs. Applicants with a thorough knowledge of construction materials, costs, and

procedures in areas ranging from heavy construction to electrical work, plumbing systems, or masonry work have a competitive edge.

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Regardless of their background, estimators receive much training on the job because every company has its own way of handling estimates. Working with an experienced estimator, they become familiar with each step in the process. Those with no experience reading construction specifications or blueprints first learn that aspect of the work. They then may accompany an experienced estimator to the construction site or shop floor, where they observe the work being done, take measurements, or perform other routine tasks. As they become more knowledgeable, estimators learn how to tabulate quantities and dimensions from drawings and how to select the appropriate material prices.

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Many colleges and universities include cost estimating as part of bachelor's and associate degree curriculums in civil engineering, industrial engineering, and construction management or construction engineering technology. In addition, cost estimating is a significant part of many master's degree programs in construction science or construction management. Organizations representing cost estimators, such as the Association for the Advancement of Cost Engineers (AACE) International and the Society of Cost Estimating and Analysis (SCEA), also sponsor educational and professional development programs. These programs help students, estimators-in-training, and experienced estimators stay abreast of changes affecting the profession. Specialized courses and programs in cost-estimating techniques and procedures also are offered by many technical schools, community colleges, and universities.

Voluntary certification can be valuable to cost estimators because it provides professional recognition of the estimator's competence and experience. In some instances, individual employers may even require professional certification for employment. Both AACE International and SCEA administer certification programs. To become certified, estimators usually must have between 3 and 7 years of estimating experience and must pass an examination. In addition, certification requirements may include publication of at least one article or paper in the field.

The AAO has considered but found unpersuasive counsel's contention to the effect that Citizenship and Immigration Services (CIS) should recognize the proffered position as one that has progressed to the point that it is now a specialty occupation. The AAO sees no evidence of this in the record. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO has also considered the letter of Chris Aimua, the architect who has worked with the petitioner. However, this letter does not establish the necessity for a bachelor's degree in architecture or any other specialty. Rather, this architect opines that "a person with an architectural background and training would be the most viable candidate," because most of the projects on which the petitioner submits bids are "commercial projects with very detailed and complex building plans" which need to be fully understood for a proper estimation of the costs. Neither this evidence nor any other evidence in the record establishes that such a background could be attained only by a bachelor's degree, or its equivalent, in architecture. In fact, the *Handbook* suggests that the technical competency for the proffered position can be attained through on-the-job training or coursework short of a bachelor's degree.

As the evidence does not establish the proffered position is one that normally requires a bachelor's degree or higher, or the equivalent, in a specific specialty, the petitioner has not met the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

II. Degree requirement that is common to the industry in parallel positions among similar organizations, or, alternatively, a particular position so complex or unique that it can be performed only by an individual with a degree.
-8 C.F.R. § 214.2 (h) (4) (iii) (A) (2).

A. Degree requirement common to the industry.

Factors often considered by CIS when determining the industry standard include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The record does not include any documentary evidence regarding an industry-wide minimum educational credential. Additionally, as discussed above, the *Handbook* does not indicate that the

proffered position is one with an industry-wide requirement for a degree in a specific specialty.

B. Degree necessitated by the complexity or uniqueness of the position.

The record fails to establish that the proffered position is either so complex or so unique that only an individual with a bachelor's degree in a specific specialty could perform it.

To the extent that they are enumerated and described in the record, however, the proposed duties comprise a position that is neither especially complex nor unique. The record does not demonstrate that the position is anymore complex or unique than that of an interior designer position limited to integrating stonework into architectural and constructional plans and homeowner's plans, and preparing bids for the same. The *Handbook* indicates that such a position would not require a bachelor's degree or higher, or the equivalent, in any specific specialty.

The director was correct in not granting the petition under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

III. Degree or its equivalent as the employer's normal requirement for the position.

-8 C.F.R. § 214.2 (h)(4)(iii)(A)(3).

There is no evidence directly relevant on this criterion, as this is the first time the position has been offered. The fact that the petitioner had earlier consulted with an architect on a *pro bono* basis does not meet this criterion.

IV. Specific duties of a nature so specialized and complex as to require knowledge usually associated with a baccalaureate or higher degree.-8 C.F.R. § 214.2 (h)(4)(iii)(A)(4).

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a bachelor's degree or higher in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussions above, the petitioner has failed to establish any one of the four specialty occupation criteria of 8 C.F.R. § 214.2 (h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

Again, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.